

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 90-638
)	
HEIDI DAMSKY)	File No. BPH-880816MW
)	
WEDA, LTD.)	File No. BPH-880816NR
)	
HOMEWOOD PARTNERS, INC.)	File No. BPH-880816NU
)	
For a Construction Permit for a New)	
FM Station on Channel 247A in)	
Homewood, Alabama)	
)	

TO: The Full Commission

**FURTHER PETITION TO ENLARGE ISSUES AND TO REMAND
FOR FURTHER HEARING PROCEEDINGS**

Heidi Damsky ("Damsky") by her attorney hereby respectfully requests the full Commission to enlarge the issues in this proceeding and remand the case for further hearings before the Administrative Law Judge. The issues requested are as follows:

- (a) To determine whether Homewood Radio Co., L.L.C. ("Homewood Radio") knowingly made an improper oral ex parte presentation to a member of the FCC staff in violation of the Commission's "ex parte" rules (47 C.F.R. Sections 1.1200 et. seq.); and

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(b) To determine whether, in light of the evidence adduced under the foregoing issues, Homewood Radio possesses the requisite basic qualifications to be a Commission licensee.

In support thereof, it is alleged:

1. The Commission is familiar with the basic facts in this proceeding. Two applicants, WEDA, Ltd., and Homewood Partners, Inc., who were formerly at each other's throats, have merged and formed a new entity, Homewood Radio Co., L.L.C., which proposes to acquire the construction permit for the Homewood FM station and sell it to Cox Radio, Inc., for \$5 million. The Commission has approved the settlement, which excluded a third applicant, Damsky. Damsky has complained, bitterly, and filed a Petition for Reconsideration of the Commission's approval of the settlement agreement, accompanied by a Motion for Stay of the effectiveness of the approval.

2. On July 14, 1998, David H. Solomon, the Deputy General Counsel of the FCC, wrote a memo to all counsel in this proceeding, a copy of which is attached and marked Exhibit A. The memo is accompanied by an internal memo from John I. Riffer, Assistant General Counsel. In his internal memo, Mr. Riffer discusses an oral presentation made to him on July 8, 1998, at approximately 3:00 p.m. by John F. Garziglia and Stephen Diaz Gavin, counsel for WEDA, Ltd., and Homewood Partners, Inc.¹ In that oral presentation, Messrs. Garziglia and Gavin told Riffer, falsely, that the matter they sought to discuss was not covered by the ex parte rules. They then sought to persuade Mr. Riffer to tell the Mass Media Bureau to issue a construction permit to Homewood Radio, so that Homewood Radio could go forth with the building of its station and the sale to Cox Radio.

¹WEDA, Ltd., and Homewood Partners, Inc., each own 50% interests in Homewood Radio Co., L.L.C. It is apparent that Messrs. Garziglia and Gavin were acting on behalf of both their original clients and the new, merged entity.

3. Obviously, the issuance of a construction permit to Homewood Radio is deeply prejudicial to the interests of Damsky. She has filed a Motion for Stay, seeking to keep these proceedings in *status quo*, pending Commission action on her Petition for Reconsideration. Wholly apart from the provisions of the Commission's ex parte rules, no ethical attorney would go to a judge and ask that judge to take an action prejudicial to the rights of another party, without notifying the other party and giving the other party a right to be present and participate in the argument. However, Messrs. Garziglia and Gavin did not notify the undersigned or give the undersigned any opportunity to be present at the meeting with Mr. Riffer.

4. Clearly, the meeting with Mr. Riffer constituted a gross violation of the Commission's ex parte rules. At a minimum, sanctions should be imposed pursuant to Section 1.1216, and Messrs. Garziglia and Gavin should be disqualified from any further participation in this proceeding.

5. Those sanctions beg the question of whether Homewood Radio should be punished for the actions of its attorneys. The cases are legion, however, that an applicant is, in fact, fully responsible for the actions of its lawyers. George E. Cameron, Jr. Communications, 93 FCC 2d 789 (Rev. Bd. 1983) at para. 25; RKO General, Inc. v. FCC, 670 F.2d 215, 231 (D.C. Cir. 1981); WADECO, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir., 1980); Lorain Community Broadcasting Co., 18 FCC 2d 686, 688 (1969), *aff'd sub nom. Allied Broadcasting, Inc. v. FCC*, 435 F.2d 68 (D.C. Cir. 1970); Midwest Broadcasting Co., 70 FCC 2d 1489, 1492 (Rev. Bd. 1979). Thus, Homewood Radio must be held fully accountable for the actions of its counsel.

6. Just recently, the Commission reaffirmed the importance of its ex parte rules. In a recent case of the renewal of license of a radio amateur the Commission denied renewal in part

because the Commission found that the amateur had improperly solicited ex parte presentations in his favor, *even though no actual presentations were made*. Herbert L. Schoenbohm, 1998WL 374970.

7. In this case, an actual ex parte presentation has been made seeking to achieve a result deeply prejudicial to the rights of Damsky. A full hearing should be held concerning the circumstances of this presentation and an opportunity should be provided for Damsky to cross examine the persons involved in this ex parte presentation and demonstrate, as she will, that no competent lawyer could possibly have failed to understand that the presentation was legally, ethically and morally wrong. Following the completion of the hearing proceeding, the Commission must evaluate whether Homewood Radio possesses the requisite qualifications to be a Commission licensee. Damsky respectfully submits that, on the basis of the facts shown herein, the Commission will have no choice except to determine that Homewood Radio does not possess those requisite qualifications.

Respectfully submitted,

HEIDI DAMSKY

July 28, 1998

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113
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By: 

Lauren A. Colby
Her Attorney

EXHIBIT A



Federal Communications Commission
Washington, D.C. 20554

July 14, 1998

Lauren A. Colby
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Federal Communications Commission
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Re: Heidi Damsky, Homewood, Alabama
MM Docket No. 90-638

Dear Counsel:

In accordance with Section 1.1212(e) of the Commission's Rules, 47 C.F.R. § 1.1212(e), enclosed is a copy of a statement submitted to this office concerning an ex parte presentation that occurred in the above-referenced proceeding. Pursuant to Section 1.1212(d) of the Rules, 47 C.F.R. § 1.1212(d), this statement shall be placed in a public file that shall be associated with, but not made a part of, the record of this proceeding.

Sincerely,

A handwritten signature in cursive script, reading "David H. Solomon".

David H. Solomon
Deputy General Counsel


Enclosure



FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

memorandum

TO: Susan H. Steiman
Associate General Counsel
Administrative Law Division
Office of General Counsel

FROM: John I. Riffer 
Assistant General Counsel
Administrative Law Division

SUBJECT: Heidi Damsky, Homewood, Alabama (MM Docket No. 90-638)

DATE: July 9, 1998

On April 30, 1998, the Commission adopted a Memorandum Opinion and Order, FCC 98-81, denying the application of Heidi Damsky, approving a settlement agreement filed by Homewood Partners, Inc. and WEDA, Ltd., and granting the application of WEDA, Ltd. Thereafter, Heidi Damsky filed a petition for reconsideration and motion for stay of the Commission's ruling. In light of the motion for stay, I contacted the staff of the Mass Media Bureau, mentioned the filing of the motion for stay and asked the Bureau to let me know if there was a request to issue a construction permit in this case.

On July 8, 1998 at approximately 3:00 p.m., John F. Garziglia and Stephen Diaz Gavin, counsel for WEDA, Ltd. and Homewood Partners, Inc., respectively, came to my office, saying that they were aware of the ex parte restrictions applicable to this hearing case and that they wanted to discuss a matter that was not covered by the ex parte rules. Mr. Garziglia proceeded to tell me that he had talked with Mass Media Bureau staff and that the Bureau had said that it would not, in light of the motion for stay, issue a construction permit in the absence of clearance from the Office of General Counsel. Mr. Garziglia then said to me that he believed that there should be no impediment to the Bureau's issuance of a construction permit merely because of the filing of the motion for stay. I responded that I understood the question being raised, that I would check with others, and that I would get back to them with our response. I also noted that, in response to an earlier status inquiry, I had previously said that I expected the Commission to complete its deliberations on the pending petition for reconsideration and motion for stay by the end of September. Our conversation concerning this matter lasted approximately 5-10 minutes.

The following morning, I became concerned about the ex parte implications of my conversation with counsel and again reviewed the motion for stay filed by Heidi Damsky. On reflection, I believe that the question concerning the Bureau's issuance of a construction permit raised during my conversation with counsel is so closely related to the relief requested by the motion, which seeks to stay the effectiveness of the Commission's Memorandum Opinion and Order, that this conversation should be treated as an ex parte presentation. Therefore, in accordance with 47 C.F.R. § 1.1212(b), at 4:00 p.m. July 9, 1998, I prepared the foregoing memorandum, which fully reflects all aspects of my July 8, 1998 conversation with counsel concerning this proceeding.

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 28th day of July, 1998, to the offices of the following:

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